No. 77-1463

IN THE

Supreme Court of the United States

October Term, 1977

PATRICIA ROBERTS HARRIS, SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *ET AL.*,
Petitioners,

v.

SADIE E. COLE, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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June 1978

INDEX

	Page
STATEMENT	1
REASONS THE WRIT SHOULD NOT BE GRANTED	6
CONCLUSION	13
ATTACHMENT A	1a
ATTACHMENT B	5a

TABLE OF AUTHORITIES

Cases:

Alexander v. *U.S. Department of Housing and Urban Development*, 555 F.2d 166 (7th Cir. 1977), *petition for writ of certiorari pending*, No. 77-874 . . . . . 5, 8, 9, 10, 11, 12

Caramico v. *Secretary of the Department of Housing and Urban Development*, 509 F.2d 694 (2d Cir. 1974) 8, 9, 10, 11, 12

Cole v. *Hills*, 396 F. Supp. 1235 (D.D.C. 1975) 1, 12

Cole v. *Lynn*, 389 F. Supp. 99 (D.D.C. 1975) 1, 2, 3

Harris v. *Lynn*, 555 F.2d 1357 (8th Cir. 1977), *affirming* 411 F. Supp. 692 (E.D. Mo. 1976), *cert. denied*, October 31, 1977 (No. 77-5233) . . . 8, 9, 10, 12

Statutes:

National Housing Act of 1949, 12 U.S.C. § 1715 z-1 2

Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970

42 U.S.C. § 4601 . . . . . 3, 8

Page

42 U.S.C. § 4622 3

42 U.S.C. § 4624 3

42 U.S.C. § 4625 3

Other Legislative Authorities:

H.R. Rep. No. 95-1161, 95th Cong., 2d Sess. 6

Sen. Rep. No. 95-871, 95th Cong., 2d Sess. 6

Federal Regulations:

24 C.F.R. § 42.95(c) 3

Miscellaneous:

Rules of the Supreme Court of the United States, Rule 19 6

Federal Rules of Civil Procedure, Rule 52(a) 2

Final Report of the HUD Multifamily Property Utilization Task Force, April, 1978 5

Relocation Handbook 1371.1 REV. (2/20/75), Sec. 1-60 10

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

Respondents ("the tenants") were low-income tenants of Sky Tower, an apartment project located in Washington, D.C.[1] The project had been acquired by a nonprofit corporation, which undertook to rehabilitate the apartments. The permanent mortgage was insured and the

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[1]Many of the pertinent facts are found in two reported decisions by the District Court. Cole v. Lynn, 389 F. Supp. 99 (D.D.C. 1975); Cole v. Hills, 396 F. Supp. 1235 (D.D.C. 1975). The decision of the Court of Appeals is printed as Appendix A to the Petition for Certiorari and will be cited as "App. A., p. ____."

interest rate subsidized by HUD under Section 236 of the National Housing Act, 12 U.S.C. § 1715z-1 (1970). HUD provided rent supplements for a number of tenants and leased other units to the local public housing agency for re-lease to eligible families as public housing.

The rehabilitation effort ran into difficulties, however, and in early 1973 the contractor quit working and liened the project. This action, coupled with a missed interest payment, rendered the mortgage in default. Both the nonprofit mortgagor and the mortgagee were nonetheless prepared to continue the rehabilitation effort, but HUD insisted that the mortgage be foreclosed and took title to the property.[2] 389 F. Supp. at 101.

HUD operated the project for over a year, continuing the rehabilitation effort, but then decided on a different course: to evict the tenants, demolish the project, and sell the property to a private developer for the construction of conventional homes for middle-income families. This was pursuant to a master plan of the District of Columbia Government to "eliminate blight." (App. A., p. 11A). After evictions began, Judge Gesell enjoined HUD from carrying out the demolition plan (for reasons that are unrelated to

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[2]The Petition for Certiorari makes an important misstatement when it refers to "involuntary federal acquisitions such as the one involving Sky Tower." (p. 10) Judge Gesell found that HUD's acquisition of Sky Tower was not "involuntary," 389 F. Supp. at 101.

The dissenting judge on the court of appeals quarrels with the finding that HUD insisted on foreclosure. He relies, however, only upon (i) a HUD version of the facts set forth in an affidavit which contained mostly second hand information and which was not filed until months after the District Court's ruling on this issue (App. A., p. 26A & n.14), and (ii) upon the judge's own suppositions of what HUD "presumably" and "doubtlessly" did (*id.*, p. 28A & n.16). This approach hardly comports with the respect due a District Court's finding under Fed. R. Civ. P. 52(a).

the issues petitioners seek to have this Court review). 389 F. Supp. at 102-06.

As for the evicted tenants, HUD took the position that they were not "displaced persons" within the meaning of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1894, 42 U.S.C. §§ 4601 *et seq.* (the "Relocation Act").

Tenants who do qualify as "displaced persons" are entitled to:

(1) moving expenses, 42 U.S.C. § 4622;

(2) relocation assistance, which includes assurance that decent, affordable replacement housing is actually available to the tenants, 42 U.S.C. § 4625; and,

(3) where the only replacement housing available is at higher than affordable rentals, replacement housing payments to cover the difference (to a limit of $4,000), 42 U.S.C. § 4624; 24 C.F.R. § 42.95(c).

HUD did undertake to pay $300 in moving expenses to tenants who were current in their rent, to exempt them from paying their last month's rent, and to provide assistance in finding suitable new homes. HUD did not, however, assure the tenants that affordable replacement housing was available or make replacement housing payments. (App. A., p. 4A).

Thus, the practical significance of the District Court's decision was that the evicted Sky Tower tenants were entitled to receive replacement housing they could afford, or, in the alternative, to receive replacement housing payments. Of the 55 low-income families who moved out of Sky Tower pursuant to HUD's eviction notices, 18 returned

to Sky Tower after the District Court enjoined demolition of the project (App. A., p. 6A); thus, the case has little continuing significance with respect to these families, for they have had suitable relocation housing since the Fall of 1975. As for the remaining families, they were unable to find replacement housing for rents that did not exceed the rents they paid before being evicted. By the time of the Court of Appeals' decision, however, HUD had decided to transfer Sky Tower to the District of Columbia and to continue providing substantial rent subsidies. (App. A, p. 7A, n.17).

Two events since the Court of Appeals' decision have narrowed still further the practical significance of the decisions below. These events were foreshadowed in the Petition for Certiorari, which pointed out that HUD "is not insensitive to the hardships" that evictions like those involved here can cause and is attempting to ameliorate those hardships, either administratively or through further legislation. (Pet., pp. 18-19).

First, the agreement between HUD and the District of Columbia regarding transfer of Sky Tower to the District Government has been amended to provide that all former Sky Tower tenants will be given a priority right to return, as apartments become available, with HUD paying relocation expenses. (Letter from Earl J. Silbert, U.S. Attorney, dated March 2, 1978, appended hereto as Attachment "A")

Second, former Sky Tower tenants who reside in another HUD project, Congress Park, but have been paying market rent may have their rents subsidized to bring them down to the Sky Tower level, pending action on Sky Tower. Such a reduction for one family was described by HUD as "an accommodation extended to *Cole* plaintiffs" so that the Government's "decision to seek certiorari" will not "deny them all the relief to which they would otherwise be entitled" by reason of the decisions below. (Memorandum

from Marilyn Melkonian, Deputy Assistant Secretary, dated March 13, 1978, appended hereto as Attachment "B")

HUD has also been taking steps that may well prevent any recurrence of the distressing predicament in which respondents[3] found themselves. A HUD Task Force, which was appointed by the current Secretary a few months after she took office, has completed an extensive study of the disposition of low- and moderate-income housing acquired by HUD after mortgage default. The Task Force report, dated April 1978, states that when HUD acquires housing in this manner it should make every effort to avoid dispositions — such as demolition and sale to private developers — that would reduce the nation's stock of below-market housing. (Final Report of the HUD Multifamily Property Utilization Task Force, April 1978, at *e.g.* pp. I, II-21, VI-2.) It is already HUD policy that demolition of low-income housing projects may not take place without the personal approval of the Secretary (*id.* at p. viii), and instead such projects must be repaired "unless there are compelling reasons not to repair them." (Memorandum from the Commissioner of FHA dated April 5, 1978, p. 1, attached as Appendix A to the Task Force Report)

The pertinent committees of both houses of Congress apparently agree with these determinations by HUD. The Senate committee has reported out a bill, entitled "Housing and Community Development Amendments of 1978," which would declare congressional policy to be "to minimize the displacement of persons from their homes and neighborhoods" as a result of Federal programs. It also would require HUD to report to Congress its recom-

[3]Or other such tenants, including the petitioners in Alexander v. U.S. Department of Housing and Urban Development, 555 F.2d 166 (7th Cir. 1977), petition for writ of certiorari pending, No. 77-874.

mendation for, *inter alia*, alleviating the problems caused by those displacements that cannot be avoided, specifically including displacements of "tenants who are not deemed eligible for assistance under the Uniform Relocation Act." (S. 3084, Sen. Rep. No. 95-871, 95th Cong., 2d Sess., May 15, 1978, p. 50) The House committee report strongly endorses the same policy against displacement of low-income tenants and recommends action by the Secretary "to assure that suitable and affordable housing is available" to persons who are displaced. (H.R. Rep. No. 95-1161, 95th Cong., 2d Sess., May 15, 1978, p. 23)

REASONS THE WRIT SHOULD NOT BE GRANTED

1. Assuming petitioners are correct in arguing that the decision below conflicts with decisions in other circuits (and we show *infra* that this is not correct), the recent events summarized above show that whatever practical significance the decision may once have had is disappearing.

It is axiomatic that this Court, with its extraordinarily heavy caseload, does not sit to review every lower court decision that might arguably be incorrect. Sup. Ct. R. 19. Instead, the matter presented for review must have considerable significance far beyond the four corners of an individual lawsuit, even if it is a class action. There must be "special and important reasons" for review on certiorari. *Id.* This standard for review by this Court is exceedingly important to the proper functioning of the Court.

This case plainly does not fit within this stringent standard — even if we indulge the assumption that there is a conflict in the circuits.

(a) At the time the 55 Sky Tower tenant families were evicted, the principal benefit which HUD denied them, and which the lower courts would require, was to assure them

suitable and affordable relocation housing. The other benefits available to "displaced persons" were substantially provided.

(b) This benefit is of no further *prospective* significance with regard to the 18 families who have already returned to Sky Tower or to the remaining families who will return to Sky Tower pursuant to the agreement between HUD and the District of Columbia — at subsidized rents — when suitable apartments become available there. Indeed, it is conceivable that all of the original 55 evicted families will have been restored to subsidized rent status before this Court could act on the merits of this case.

(c) There is little chance that other low-income tenants of HUD-owned housing will find themselves in a situation comparable to that of the tenants in this case. Demolition of such projects is now disfavored and in any event requires the personal approval of the Secretary. Moreover, HUD has for some time been seeking ways to ameliorate the distressing burden that can be caused when demolition is the only feasible course, and those efforts can be presumed to be continuing,[4] especially in view of the recent expressions of interest by the committees of Congress that are considering amendments to the pertinent Federal housing laws.[5]

In short, a decision either affirming or reversing the decision below is likely to have little or no impact on the fundamental issue: the treatment of low-income tenants

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[4]Both the letter from U.S. Attorney Silbert and the memorandum from Deputy Assistant Secretary Melkonian make this clear.

[5]We are at a loss to understand how allowing the decision below to stand will "deprive the Department of the flexibility it needs" to develop suitable new relocation policies, as petitioners contend (Pet., p. 19).

displaced from HUD-acquired, multifamily subsidized housing projects.

2. The argument set forth above assumes that there is in fact a conflict between the decision below and three other decisions in three other circuits. *Alexander v. U.S. Department of Housing and Urban Development, supra; Harris v. Lynn*, 555 F.2d 1357 (8th Cir. 1977), *affirming* 411 F. Supp. 692 (E.D. Mo. 1976), *cert. denied*, October 31, 1977 (No. 77-5233); and *Caramico v. Secretary of the Department of Housing and Urban Development*, 509 F.2d 694 (2d Cir. 1974). In truth, however, there is no such conflict. All four decisions are consistent.

Petitioners agree that the tenants are eligible for full statutory relocation benefits if they may be deemed "displaced persons" under Section 101(6) of the Relocation Act, 42 U.S.C. § 4601(6). That section provides in pertinent part:

> "The term 'displaced person' means any person who . . . moves from real property . . . as a result of the acquisition of such real property, in whole or in part, or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance; ***."

As noted by the Court of Appeals, this provision sets out two alternative grounds of eligibility for statutory benefits: (1) those who move as a result of the acquisition of property for a Federal program or project (the "acquisition clause"), or (2) those who move as a result of a written order of the acquiring agency to vacate the property for a Federal program or project (the "notice clause").

The facts in the instant case make it clear that HUD was an "acquiring agency," that written orders to vacate were

issued to the tenants pursuant to a Federal "program or project," and that the tenants moved "as the result of" HUD's orders to vacate. Based on the plain meaning of Section 101(6), therefore, the Court of Appeals found the tenants eligible for benefits under the notice clause of the Relocation Act. (App. A, pp. 9A-11A).

Petitioners argue, however, that benefits should have been denied because of the absence of two further limiting tests, not specified in Section 101(6) but purportedly found in the *Alexander, Caramico* and *Harris* cases. They argue (1) that the notice to vacate must be issued simultaneously with the acquisition or proposed acquisition, citing *Alexander* and *Harris*, and (2) that the statute applies only to displacements for construction projects, thereby excluding displacements due to demolition, citing *Alexander* and *Caramico*.

Those cases, however, do not stand for the propositions for which petitioners cite them.

First, neither *Alexander* nor *Harris* turned on the existence of a time lag between acquisition and notice.

In *Alexander*, HUD held the mortgage to the defaulting apartment complex for three years and operated the project for a period of time following foreclosure. The complex was then vacated because it was "plagued by unsafe conditions" and had become "an irretrievable failure," 555 F.2d at 168, 170. Relocation benefits were denied in *Alexander* because the court found no Federal "program or project" in HUD's surrender to necessity, not because of any delay between the acquisition and the decision to vacate the buildings.

The facts in the *Harris* case are even more remote. The court was interpreting the "acquisition" clause and not the "notice" clause of Section 101(6). In *Harris* the failing apartment complex was never "acquired" by HUD; it was

owned at all times by the St. Louis Housing Authority whose decision, with HUD's concurrence, led to the project's demolition. In response to elaborate theories devised by the plaintiffs to demonstrate a Federal "acquisition," the court assumed for purposes of argument that an attenuated form of Federal acquisition might have occurred in 1955 — eighteen years prior to the displacements. Holding that "displaced persons" under the Act are limited "to those forced to move as a result of an 'acquisition'", the court simply decided that the 1973 displacements could in no sense be the "result of the government's alleged 1955 'acquisition' of ownership." 411 F. Supp. at 695. Nothing in *Harris* requires the rigid rule of simultaneity between acquisition and displacement urged by petitioners here.

Second, it is inaccurate to contend that *Alexander* and *Caramico* limit eligibility to displacements caused by Federal "construction" projects and deny eligibility when the displacements are caused by mere "demolition."[6] The discussion of Federal highway or housing "construction" projects in *Alexander* and *Caramico* was intended only to

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[6]The dissent in this case offers no comfort to this argument. Suggesting that this theory was only a straw man devised by the majority, Judge Wilkey wrote that the government would never make this "rather simple-minded" and "clearly flawed" argument. Significantly, Judge Wilkey found that:

> "Not only would this argument generally be rather simple-minded, because demolition usually precedes construction, but HUD would have to know that it would be inapplicable here, as Sky Tower was concededly being torn down to make way for the construction to single-family units." App. A., p. 34A.

It is significant that HUD's own regulations provide that demolition projects are "programs or projects" within the meaning of the Relocation Act. Relocation Handbook 1371.1 REV (2/20/75), Sec. 1-60, p. 1-5.

distinguish the facts in those cases — wherein HUD *involuntarily* acquired title to failing housing projects and vacated them with no other purpose than to terminate the project — from the conventional Federal programs specifically designed to cause displacement in order to achieve a public benefit. In both cases the courts were unwilling to tax the Federal government with relocation obligations where the displacements were found to be wholly "random and involuntary" and lacking in any affirmative public purpose.

In the *Alexander* case, the mortgage was assigned to HUD in 1970 and held for three years before HUD foreclosed "in the face of the mortgagor's continuing default." 555 F.2d at 167. HUD then acquired title to the property and sought unsuccessfully to manage it. The property had declined so dramatically, however, that HUD decided to terminate the project, vacate the tenants, and demolish the buildings. Contrary to petitioners' assertion, the *Alexander* court did not deem the Relocation Act inapplicable because of the absence of a Federal construction project. It held only that since the government decided to demolish the housing project there for no other reason than that it had become "an irretrievable failure," no "program or project" of any variety was present. The Seventh Circuit expressly interpreted the "program or project" phrase as requiring only "activities designed for the benefit of the public as a whole." (*Id.* at 170) The bare decision to demolish a failing housing complex was deemed insufficient because it was in no sense "a prelude to some governmental undertaking amounting to a program designed for the benefit of the public as a whole." 555 F.2d at 170. See App. A., p. 11A.

Similarly, in *Caramico* the court concluded that the default acquisition there was "random and involuntary" and not the result of a "conscious government decision." 509 F.2d at 698. In *Caramico*, the project owners defaulted

and the mortgagees sought to evict the plaintiff-tenants in order to comply with an FHA requirement predicating recovery of FHA guaranteed mortgage insurance on the tender of the property unoccupied. The court concluded that the FHA acquisition in *Caramico* was "clearly involuntary" and was accordingly not "for a program or project undertaken by a Federal agency" as required by the statute. 509 F.2d at 699.

In the instant case on the other hand, the District Court expressly found that the foreclosure-transfer to HUD was not "involuntary" but was imposed on the owners and mortgagees at HUD's "insistence". 389 F. Supp. at 101.[7] Further, the decision to vacate and demolish the Sky Tower complex had a specific objective "for the benefit of the public as a whole"; namely, to "eliminate blight" and to improve the neighborhood in accordance with the District of Columbia government's master plan. 396 F. Supp. at 1236. Thus, because the supposed conflict with *Alexander* and *Caramico* rests on the petitioners' assertion that all three cases involve "involuntary" acquisitions (Pet., p. 10), there is in fact no conflict.

In short, while the result in the instant case differs from the results in *Alexander*, *Caramico* and *Harris*, the standards adopted by the Second, Seventh and Eighth Circuits in no way bar the tenants in this case from receiving Relocation Act benefits. There is accordingly no conflict among the circuits necessitating review by the Court.

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[7]See n. 2, p. 2, *supra*, discussing the treatment this finding received from the dissenting judge in the Court of Appeals.

CONCLUSION

For each of the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 1978

ATTACHMENT A

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE UNITED STATES ATTORNEY
WASHINGTON, D.C. 20001
MARCH 2, 1978

ADDRESS ALL MAIL TO:
UNITED STATES ATTORNEY
ROOM 3138-C
UNITED STATES COURT HOUSE BUILDING
3RD AND CONSTITUTION AVENUE NW

IN REPLY, PLEASE REFER TO
INITIALS AND NUMBER

EJS: NDibad

Florence Wagman Roisman, Esq.
National Housing Law Project
Suite 500
1025 - 15th Street, N.W.
Washington, D.C. 20005

Re: *Cole* v. *Harris*

Dear Ms. Roisman:

The Department of Housing and Urban Development has requested that our office inform you that HUD and the National Capital Housing Authority have amended the agreement for the sale of Skytower Apartments to provide for the return of the thirty-seven former Skytower tenants who did not exercise their option to return pursuant to the preliminary injunction of the District Court. A copy of the amendment to the agreement is enclosed.

HUD and NCHA are willing to provide, upon rehabilitation of the units at Skytower, for the return of any former tenants who left as a result of HUD's notice to vacate and who wish to return, provided they agree to return as units of appropriate size at Skytower become available for occupancy. We believe that it would be appropriate for you to meet with representatives of HUD and NCHA to develop a procedure for notifying these former tenants of this opportunity and to make arrangements for their return. We suggest that you telephone Stuart Malmon,

Esq., Office of the Area Counsel, HUD (673-5897) to arrange a meeting.

Sincerely yours,
EARL J. SILBERT
United States Attorney
By: /s/ ROBERT N. FORD
Chief, Civil Division

Enclosure
cc: (w/encl.)

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AMENDMENT TO AGREEMENT FOR ACQUISITION OF SKYTOWER APARTMENTS

The agreement between the Department of Housing and Urban Development (hereafter referred to as "HUD") and the National Capital Housing Authority (hereafter referred to as the "Authority") for the transfer of Skytower Apartments from HUD to the Authority is hereby amended as follows:

1. The reference to 221(d)(3) of the National Housing Act in the second introductory clause and in subsection 2b and c are deleted and 221(d)(4) of the National Housing Act is substituted therefor.

2. Consistent with the previously expressed position of the Authority, HUD will resist any attempt to force HUD to lease additional units at Skytower to former tenants before passage of title from HUD to the Authority. However, if for any reason HUD does lease such additional units to former tenants, or if the Authority must accept former tenants into Skytower before rehabilitation is completed, HUD will bear all costs of relocation of these families where such relocation is necessary for rehabilitation by the Authority pursuant to the Agreement. The Authority agrees to use its best efforts to execute its rehabilitation program in such a way as to minimize the need for any such relocation and to the extent possible, to limit such relocation to no more than one move per family.

3. HUD will not move any persons not formerly tenants of Skytower into the project.

4. HUD and the Authority agree to offer all former Skytower tenants the opportunity to move back to Skytower as units become accepted for occupancy by D.C. inspectors following the rehabilitation.

However, if notwithstanding this offer it becomes necessary after rehabilitation to hold any units vacant while a court or HUD gives former tenants an opportunity to move back to the project, HUD will pay to the Authority the difference between the amount authorized under Section 8 ACC and the full rent for those units during such period.

This amendment dated as of the [January 31] day of January, 1978.

The Department of Housing and Urban Development
By: /s/ Thomas R. Hobbs,
Acting Area Director
HUD Washington, D.C.
Area Office
National Capital Housing Authority
By: /s/ Lorenzo W. Jacobs, Jr.,
Director
D.C. Department of Housing and Community Development
National Capital Housing Authority

ATTACHMENT B

MEMORANDUM
U.S. DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT

Date: Mar 13

TO : Mr. Thomas Hobbs
Director, D.C. Area Office

FROM : Marilyn Melkonian
Insured & Direct Loan Programs

SUBJECT: Return of the Jarrells Family
to Tenancy at Congress Park

IN REPLY REFER TO:

The Office of General Counsel has drafted the attached letter to the manager of Congress Park with the explicit intention of limiting the availability of such treatment to the *Cole* litigation. Since there is no express authority for subsidizing rentals on a case-by-case basis, even in HUD-owned housing, it is an accommodation extended to *Cole* plaintiffs because of the present posture of the litigation; i.e., they have prevailed in the Court of Appeals and our decision to seek certiorari is not an attempt to deny them all the relief to which they would otherwise be entitled. Since HUD does not contest that when the case is finally decided, plaintiffs will, at the least, be provided safe and sanitary housing at no more than 25 percent of family income as rent, we agree to place the Jarrells at Congress Park at that rental until an apartment is ready at Skytower.

Unless the attached draft poses problems which you feel we must discuss further, I would appreciate your preparing the attached draft in final for the appropriate signature at the Area Office level. Please do what you can to expedite

the return of the family to the unit from which they were evicted. Unless the unit has suffered damage since the family vacated, the unit must be returned to them in its present condition.

In addition, the previous rent arrearages have not been forgiven. I would like your recommendations concerning suitable repayment provisions. In the meanwhile, the existence of the arrearage shall not be used as a reason for further eviction. Future rent arrearages may, however, be considered as grounds for eviction.

/s/ Marilyn Melkonian
Deputy Assistant Secretary

Attachment.